

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DUPREE BURROUGHS,	§	
	§	No. 444, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0812011378
Appellee.	§	

Submitted: February 10, 2011

Decided: April 21, 2011

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 21<sup>st</sup> day of April 2011, upon careful consideration of the appellant's brief pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response, it appears to the Court that:

(1) On April 19, 2010, a Superior Court jury convicted the appellant, Dupree Burroughs, of Assault in the Second Degree (as a lesser-included offense of Assault in the First Degree) and Possession of a Firearm During the Commission of a Felony.<sup>1</sup> On June 18, 2010, Burroughs was sentenced to a total of sixteen years at Level V suspended after ten years for

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<sup>1</sup> Pursuant to the parties' stipulation, Burroughs was also convicted of Possession of a Firearm by a Person Prohibited.

six years at Level IV suspended after six months for two years at Level III probation. This is Burroughs' direct appeal.

(2) Burroughs' appellate counsel ("Counsel")<sup>2</sup> has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c) ("Rule 26(c)").<sup>3</sup> Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. Burroughs, however, has submitted claims of insufficient evidence and prosecutorial misconduct for this Court's consideration. The State has responded to Burroughs' claims and has requested that the judgment of the Superior Court be affirmed.

(3) When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims.<sup>4</sup> The Court must also conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>5</sup>

(4) In this case, the charges against Burroughs arose from the December 7, 2008 shooting of Jonathan Simmons outside of Pharos, a

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<sup>2</sup> Burroughs was represented by different counsel at trial.

<sup>3</sup> See Del. Supr. Ct. R. 26(c) (governing criminal appeals without merit).

<sup>4</sup> *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

<sup>5</sup> *Id.*

Wilmington nightclub. Garland Williams and Richard Carpenter worked as security guards at Pharos the night of the shooting. At Burroughs' trial, both men testified that they witnessed the shooting, albeit from different vantage points.

(5) The record reflects that the events leading to the shooting began inside the club when a large fight broke out on the dance floor. Williams helped escort a group of unruly bar patrons, including Burroughs and Simmons, from the scene of the fight, *i.e.*, the dance floor, through the club's double doors and outside into the parking lot. Carpenter remained inside the club to help restore order.

(6) Williams testified that outside of the club, from a distance of about twenty feet, he saw Burroughs pull a gun, approach Simmons, strike him with the gun and then shoot him. Soon after, according to Williams, Burroughs fled the scene in a black SUV before the police arrived. Carpenter testified that inside the nightclub, from a distance of about sixty feet, he saw through the club's open double doors a man – who was not Burroughs – shoot Simmons.

(7) In his first claim on appeal, Burroughs contends that he was convicted on the basis of insufficient evidence. We disagree. Under Delaware law, the jury is the sole trier of fact, responsible for determining

witness credibility and resolving conflicts in the testimony.<sup>6</sup> It is entirely within the discretion of the jury to accept one witness' testimony and reject conflicting testimony of the same witness or that of other witnesses.<sup>7</sup> In this case, given the testimony of the witnesses and the evidence presented, the Court concludes that there was sufficient evidence to support Burroughs' conviction of Assault in the Second Degree and Possession of a Firearm During the Commission of a Felony.

(8) In his second claim on appeal, Burroughs claims that the prosecutor committed a *Brady* violation. We disagree. A *Brady* violation occurs when a prosecutor fails to disclose favorable evidence that is material to either the guilt or punishment of the defendant.<sup>8</sup> Evidence is considered material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.<sup>9</sup>

(9) In this case, the undisclosed evidence consisted of a spent shell casing that was recovered by the police from Pharos' parking lot the night of the shooting. Ballistics testing determined that the casing came from a firearm that was used in a separate, unrelated homicide. Burroughs has not

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<sup>6</sup> *Williams v. State*, 539 A.2d 164, 168-69 (Del. 1988).

<sup>7</sup> *Id.*

<sup>8</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>9</sup> *U.S. v. Bagley*, 473 U.S. 667, 682 (1985).

demonstrated how a shell casing unrelated to the December 7, 2008 shooting of Jonathan Simmons could have been beneficial to his case and/or how he was prejudiced by not having that information prior to trial.

(10) The Court has reviewed the record carefully and has concluded that Burroughs' appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Counsel made a conscientious effort to examine the record and the law and properly determined that Jones could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice